KOH SIAK POO

v.

PATANI MOTOR (K) CO. SDN. BHD.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 23-41-87]
23 DECEMBER 1989

CONTRACT: *Sale and purchase agreement entered into between plaintiff and defendant - Clause 3 of agreement - Alleged breach - Defendant terminated sales and purchase agreement - Plaintiff accepted breach but without prejudice to his rights claimed amount paid to defendant - Suit filed - Defence - Whether mere allegation - Claim by plaintiff based on written contract - Extrinsic evidence - Whether permissible in light of s. 92 of the Evidence Act.*

The plaintiffs claim against the defendant company, arises under a deed entered into between them and is for repayment of monies amounting to RM354,000 which were made towards the purchase price in respect of two shophouses which the plaintiff had agreed to buy from the defendant company.

The plaintiff applied for summary judgment under O. 14 Rules of the High Court 1980, but this was dismissed, however the Court allowed the matter to be further argued in open Court after the appeal against the summary judgment failed.

The plaintiff avers that due to a breach on the part of the defendant company of cl. 3, which relates to the agreement by the plaintiff to remove caveats on the lot, the acknowledgment by the defendant company of the receipt of 30% of the purchase price for the lots and the reference to two receipts relating to that, the obligation of the defendant company to procure for the plaintiff a loan of 70% of the purchase price of the lots and until then the plaintiff not being obliged to pay any progress payments.

On 31 December 1986, the defendant company terminated the sales and purchase agreements in respect of the 2 properties.

The plaintiff through a letter dated 24 January 1987 accepted the defendants' repudiation of the agreement without prejudice to his legal rights against the defendant company and termed the repudiation as wrongful.

The plaintiff averred that due to the breach on the part of the defendant company of cl. 3 of the deed the amount of RM354,000 paid to the defendant company became returnable to the plaintiff.

Held:

[1] There is nothing in the allegation which shows situation coming under the provisos to s. 92 of the Evidence Act to allow the admission of extrinsic evidence for impugning the deed and consequently there is no defence to the claim.

[2] The claim is under the deed and is for monies paid towards the purchase price of the two lots and there is no mention in the deed that any of the monies paid was paid as deposit. Therefore there is no merit on the defendants contention that the plaintiff had wrongly applied for summary judgment under O. 14 as a refund of a deposit had been claimed for under the statement of claim and that the proper application should have been under O. 81 of the Rules of the High Court.

[Order accordingly.]

Case referred to:
Tindok Besar Sdn. Bhd. v. Tinjar Co. [1976] 2 MLJ 229

Legislation referred to:
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 14, O. 18

For the plaintiff/respondent - Mahinder Singh Dulku and Foong Kai Chong; M/s. Mahinder Singh Dulku & Co.
For the appellant - Van Buerle; M/s. Cheong Wai Meng & Van Buerle)

JUDGMENT

KC Vohrah J:

The plaintiff's claim against the defendant company, housing developers, arises under a deed entered into between them and is for the repayment of monies amounting to RM354,000 which were made towards the purchase price in respect of two shophouses which the plaintiff had agreed to buy from the defendant company.

The plaintiff applied for final judgment against the defendant company under O. 14, Rules of the High Court and the Senior Assistant Registrar gave judgment to the plaintiff. I heard and dismissed the appeal against the decision of the Senior Assistant Registrar in Chambers but I allowed the matter be further argued in open Court.

On 5 February 1985 a deed was entered into between the plaintiff and the defendant company with the then managing director of the defendant company, Lim Luan Heng, as such managing director, executing the deed on behalf of the defendant company.

There are two recitals in the deed in respect of the defendant company ("developer" in the deed) and the plaintiff ("purchaser" in the deed) as regards the purchase by the plaintiff of two lots from the defendant company, the payment of a percentage of the purchase price for both lots and the agreement for the removal of caveats on the lots by the plaintiff. And the recitals read thus:

> Whereas
>
> (1) The developer is developing a housing scheme known as Taman Petani Baru (Phase 1) and the purchaser has agreed to purchase Lots No. 5438 and 5439 thereat and has in 1983 paid 10% of purchase price for his respective lots.
>
> (2) At the request of the developer the purchaser has agreed to vacate his private caveat lodged by him against the said lots.

The deed in 3 clauses then goes on to state the substance of the agreement, which briefly stated, relates to the agreement by the plaintiff to remove caveats on the lots, the acknowledgment by the defendant company of the receipt of 30% of the purchase price for the lots and the reference to two receipts relating to that, the obligation of the defendant company to procure for the plaintiff a loan of 70% of the purchase price of the lots and until then the plaintiff not being obliged to pay any progress payments. The 3 clauses of the deed read as follows:

> **Now This Deed Witnesseth as Follows:**
>
> 1. In consideration of the premises, the purchaser hereby agrees to remove his private caveat against the said lots.
>
> 2. The developer hereby acknowledges receipt of a total of 30% of the purchase price in respect of the respective lots and has issued two receipts for the aforesaid amounts.

> 3. Notwithstanding anything contained in the sale and purchase agreement entered into by the parties thereto, the developer shall procure a housing loan of 70% of the purchase price for the purchaser in respect of each of his purchase of the respective lots. Until the developer obtains the aforesaid loan, the developer shall not call for any more progress payments and if it calls for such payments the purchaser is not obliged to pay the aforesaid payments nor pay any interest on any late payments. Upon approval of the housing loan the developer shall be entitled to the release of the progress payments as stipulated in the sale and purchase agreement. The interest for the housing loan should not exceed 13%.

It is clear that in fulfilment of his bargain under clause (1) of the deed the plaintiff executed, and this is not disputed by the defendant company, the appropriate document on the date of the deed, 5 February 1989, for the removal of the caveats lodged on the two lots of properties (see KSP7 exhibited in affidavit of the plaintiff affirmed on 2 May 1987).

In regard to cl. (2) of the deed where the defendant company acknowledged receipt of a total of 30% of the purchase price in respect of the respective lots, this works out at RM354,000 being the sum of 30% of RM450,000 for lot 5438 (i.e. RM135,000) (see KSP4 of plaintiff's affidavit affirmed on 2 May 1987) and 30% of RM730,000 for lot 5439 (i.e. RM219,000) see KSP5). The amount is what is claimed in the statement of claim.

In regard to the two receipts mentioned in clause 2 of the deed, a sight of the two receipts both dated 1 January 1985 referred to in affidavit of the plaintiff affirmed on 2 May 1987 (see KSP3) shows that the defendant company acknowledged receipt of RM135,000 in respect of lot 5438 and RM219,000 in respect of lot 5439 respectively on 1 January 1985.

Now it is not disputed that the defendant company demanded payment from the plaintiff for the balance of the purchase price in respect of the two lots. This was done after Lim Luan Heng, the managing director of the defendant company who executed the deed for the defendant company, had died. The plaintiff, however, pleads breach of clause 3 of the deed: clause 3 of the deed expressly states that the defendant would procure a loan for the balance of the purchase price in respect of the two lots and unless and until the loan is obtained the defendant company would not call for any further progress payments comprised in the balance purchase price.

On 31 December 1986 the defendant company terminated the sales and purchase agreements in respect of the two properties. The plaintiff through a letter dated 21 January 1987 accepted the defendant's repudiation of the agreement without prejudice to his legal rights against the defendant company and termed the repudiation as wrongful. The plaintiff averred that because of the breach on the part of the defendant company of clause 3 of the deed the amount of RM354,000 paid to the defendant company became returnable to the plaintiff.

I cannot see any real defence put up by the defendant company. What the defendant company has done is to make certain allegations. One of the allegations that Lim Yong Chew the present managing director of the defendant has made in his affidavit affirmed on 13 March 1989 and 5 August 1989 (see encls. 21 and 36) is that no monies were paid by the plaintiff to the defendant company notwithstanding what is stated in the deed and a whole host of documents has been exhibited in his affidavits in an attempt to bolster that allegation. But in this case the claim of the plaintiff is based on a written contract, i.e. the deed executed on 5 February 1985 between the two parties and the action by the plaintiff is to enforce the terms of the contract for breach of clause 3 of the deed. The law is clear - s. 92 of the Evidence Act 1950 specifically excludes evidence to contradict, vary, add or subtract from any terms of the contract in writing except in any of the situations spelled out in the provisoes thereto: see the Federal Court case of *Tindok Besar Sdn. Bhd. v. Tinjar Co.* [1976]

2 MLJ at 229 at 223 and also the grounds of decision of the Supreme Court dated 14 July 1989 in *Koh Siak Poo v. Perkayuan O.K.S. Sdn. Bhd. & Ors.*, Supreme Court Civil Appeal No. 289 of 1988.

So much for the allegations relating to the non-payment of purchase price by the plaintiff. There are three other allegations made by Lim Yong Chew in respect of the deed which he termed as a one sided agreement:

1. that when the then managing director executed the deed the man had no independent legal advice;
2. that the said man was then nearly 70 years old and he was illiterate and "I am sure he cannot (*sic*) understand and/or comprehend the nature and effects (*sic*) of the deed."
3. that the deed was "executed under fraudulent and/or undue influence circumstances (*sic*) in that the plaintiff knew that he did not pay to the defendant company a sum of RM354,000".

These allegations are made in the same affidavits of Lim Yong Chew. Lim Yong Chew, the new managing director of the defendant company, is the son of Lim Luan Heng the former managing director who executed the deed on behalf of the defendant company.

From what has been stated in the above affidavits and other affidavits filed by him in this matter it is clear that he is not at all sure as to what had taken place between his father and the plaintiff. What, however, is clear is that he was not present when the deed was executed. He has made all the above 3 allegations as a matter of surmise and he even speculates, after making the allegation of fraud and undue influence, above mentioned, further more, thus, "I would therefore state that the plaintiff has committed a fraud on the defendant company." And he goes further to rope in his father in the alleged fraud thus, "... and the defendant's former managing director was a party to such fraud." And he then continues inconsistently "the said deed should therefore be set aside on the **fraud committed by the plaintiff**".

In regard to his allegation that his father had no independent legal advice I cannot see the relevance of the argument unless there are concrete primary facts raised to show that the plaintiff had intimidated him or had misrepresented facts to him and had fraudulently induced him to sign the deed. And there are no such facts. Instead Lim Yong Chew makes the bare allegations that his father defrauded the defendant company by executing the deed in collusion with the plaintiff but inconsistently makes the allegation that his father was old and illiterate and that he could not understand the nature and effect of the deed.

To my mind there is nothing in the allegations which shows situations coming under the provisoes to s. 92 of the Evidence Act to allow for the admission of extrinsic evidence for impugning the deed, and consequently there is no defence to the claim. It is for these reasons that I dismissed the appeal of the defendant against the decision of the Senior Assistant Registrar who gave judgment to the plaintiff.

In passing I would like to state that it was raised by the defendant company that the plaintiff had wrongly applied for summary judgment under O. 14 as a refund of a deposit had been claimed for under the statement should have been under O. 81. With respect I do not think there is merit in that objection. The claim is under the deed and is for monies paid towards the purchase price of the two lots and there is no mention in the deed that any of the moneys paid was paid as deposit.

Also found at [1990] 1 CLJ 500